IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 68 of 1982
with
CIVIL APPLICATION No.8760 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DOSHI NANALAL MOTICHAND, SINCEDEC.THRO' LEG.HEIRS & REP.
Versus
GANDHI RASIKLAL GIRDHARLAL

Appearance:
1. Second Appeal No. 68 of 1982
MR VC DESAI for Petitioner No. 1-1/H
MR PV HATHI for Respondent No. 1
..... for Respondent No. 2
NOTICE SERVED for Respondent No. 3-4
MR KH DAMANI for Respondent No. 5-6

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 29/08/2002

ORAL JUDGEMENT

The present Second Appeal arises out of the judgement and decree passed in Regular Civil Suit No.86 of 1975 decided by the learned Civil Judge (Junior Division), Palitana on 31.3.1978, which was confirmed by the learned Extra Assistant Judge, Bhavnagar in Regular Civil Appeal No.88 of 1978 by his judgement and order dated 27.11.1981 whereby he dismissed the appeal and confirmed the judgement and decree passed by the learned trial Judge.

2. The learned trial Judge was pleased to partly decree the suit and order that the plaintiff is entitled to 'right of passage' leading to Station Road situated at north of Block 'A' and the defendants were ordered to remove the construction in the passage and the defendants were further, permanently restrained from causing any obstruction in the passage at north, to the plaintiff in using the said passage.

3. This Second Appeal was filed in February 1982. The matter was listed for final hearing in the year 1999. It was adjourned from time to time. On 23.2.2001 the Court passed the following order.

> "Learned advocate Mr.P.V. Hathi appearing for respondent no.1 has filed a note tat he has instructions from his client not to appear in the matter. Under the circumstances, office to issue notice to respondent no.1 returnable on the 23rd March, 2001."

Said notice is served to respondent no.1 and the Bailiff's report to that effect dated 12.3.2001 is on record of the case. Despite that service, respondent no.1 has not caused any appearance in the Second Appeal, possibly because he must have lost interest in the matter which can be inferred from the facts of the case. Other respondents are the predecessors in title of the present appellant-- original defendants from whom he had purchased the property. Respondent no.2 was deleted by an order passed in Civil Application No.11869 of 2000 dated 23.5.2001. The respondents except no.1, have no subsisting interest in the present proceedings. It is only respondent no.1 who is the main contesting party.

4. Short facts giving rise to the present proceedings are that, the plaintiff filed a suit against the defendants for getting the obstacle caused by defendant no.1 removed and also to get permanent

injunction against them from obstructing the right of way for going to his block at Bhairavpara, Station Road. As the facts go, the suit was between the landlord and the tenant. Defendant no.1 is the owner and the plaintiff occupied eastern block for rent at the rate of Rs.45/-, per month in the year 1962. The plaintiff enjoyed the block by residing in it with family. The plaintiff had a shop on a road and for going to his shop-- a coal depot, he used the disputed way and as averred by the plaintiff, the closure of the said way by defendant no.1, is absolutely an illegal act as on account of that the plaintiff cannot pass through the passage. The plaintiff prayed for reliefs as set out hereinabove.

5. The appellant-- the original defendant contested the suit. Defendant no.1 filed written statement at exh. 15, defendants no.2 to 5 did not file separate written statement but supported the written statement of defendant no.1. It was the case of defendant no.1 that the suit was filed due to vengeance. It suffered from infirmities, like delay, latches and acquiescence. That the suit suffered from a defect of misjoinder of parties. The way claimed by the plaintiff was never used by him in the past. The wall was constructed for giving support to block no.1 and lastly he stated that as the plaintiff had his way on eastern side and it was absolutely useless to go through the disputed way, he prayed for dismissal of the suit.

6. The learned trial Judge while appreciating the rival contentions of both the parties held that the plaintiff was able to establish that he was the tenant of defendant no.1 for the premises including the disputed passage. The learned trial Judge for reaching this conclusion relied upon a document, a Rent Note, exhibit 70, which was not between the parties, but it was a rent note between defendant no.1 and a third party, named, Murajmal Savalmal. The learned trial Judge appreciating the facts recorded a finding in para 11 as under:

> ".. .. The defendant's block, no doubt, is just near to east road and the pltff can approach the station road by taking a turn at west from road. The rent note is produced at exh.77 and certified copy of it at exh.51. The rent note is silent about the road for approaching the claimed premises. The rent note is giving the right as a tenant to the pltff from 1.4.62. This is the document which makes entitled the pltff to use the block 'A'. .. .."

7. It is interesting that despite having found that there was no mention about, 'right of the tenant to use the disputed way', the learned trial Judge reached the aforesaid conclusion by appreciating the rent note at exh.70, which is not between the plaintiff and defendant no.1. The learned trial Judge has recorded about exh.70 as under:

> ".. .. The other rent note, exh.70 is between Murajmal Savalmal and deft. no.1. .. .."

The learned trial Judge could not have taken assistance of the said document, exh.70 which is not between the parties to the present proceedings especially when there was a rent note executed between the parties governing their rights. The position would have been different if there was no rent note between the parties to the proceedings.

7.1 The learned Judge while dealing with the question of alternative way, has recorded categorical findings in para 13 to the effect that,

> ".. The plaintiff has an alternative way at east side, he may use or may not, but the right of passage which is in dispute is established by him by oral and documentary evidence. Hence i decide issue no.1 and 2 in affirmative and 5 in negative."

8. Being aggrieved of this, the present appellant preferred Regular Civil Appeal before the District Court being Regular Civil Appeal No.88 of 1978 in which the learned first appellate Judge, on appreciation of evidence came to the conclusion that, 'the present respondent-original plaintiff has proved that the disputed passage is part and parcel of his lease and he is using the same since the time of his lease'. He also came to the conclusion that the original plaintiff is able to prove that, 'defendant no.1 is illegally obstructing the passage and that as a resultant effect thereof the original plaintiff is entitled to relief of removal of obstructions and permanent prohibitive injunction as prayed for in the suit'. The learned first appellate Judge while dealing with the rent note between the parties, exh.77 has observed under:

> " .. .. Exh.77 is the rent note under which the present plaintiff got the blocks in question and it is urged on the basis of this

that it does not mention of the passage as part of lease given and it is no doubt true that this document does not speak of passage particularly. But non recital of passage in this document perse does not destroy the plaintiff's case." (emphasis supplied)

The learned first appellate Judge also committed the same error as was committed by the learned trial Judge because he too relied upon the rent note between the defendants and the third party-- exh.70 for reaching to this conclusion.

8.1 So far as the question of alternative way is concerned, the learned first appellate Judge recorded that,

".. .. In the cross examination it is brought out that in the east there is Municipal Road. There are gutters and ditches and therefore, it is not useful as road. .. .."

9. The learned advocate Mr.Desai submitted that besides the substantial questions of law, which are formulated in this Second Appeal, which are mentioned in para 4, clause (a) to (d), an additional substantial question of law is required to be formulated by this court in the interest of justice. Mr.Desai submitted that as both the courts have committed an error of interpreting the contents of the rent note-- exh.77, it becomes a substantial question of law. He relied upon the judgement of the Honourable the Apex Court in the matter of Muthu Goudner v. Ammayee Ammal, reported in (2002) 6 SCC 194 wherein the Honourable the Apex Court was pleased to hold that, 'it is open for the High Court to hear an appeal on any other substantial question of law not formulated by it, provided it is satisfied that the case involves such other substantial question'. The Honourable the Apex Court has observed that, in that event, the High Court is required to give reasons. In the present case, the following substantial question of law is formulated.

"Having regard to exhibit 70 whether the courts below have erred in law in drawing an inference that the passage as alleged is annexed to the tenancy right of the plaintiff?"

9.1 Both the courts below have held that the plaintiff is having right of way in the disputed passage, relying upon the contents of exh.70, the rent note

between defendant no.1 on the one hand and a third party on the other. It is to be borne in mind that when there is a rent note between the parties-- the plaintiff and defendant no.1, there was no necessity to look into the document which is not between the parties. As the courts below have looked into the said document, aforesaid substantial question of law is formulated and decided by this Court.

10. It is on record that the plaintiff had come forward with the case that though it was not specifically mentioned in the rent note, exh.77, the disputed passage was part of lease, merely because he had been using that passage as a way, the disputed passage becomes part and parcel of the tenancy rights of the plaintiff. It is also the case of the plaintiff that, 'road on the eastern side of his block is not as convenient or advantageous as the disputed way is'. He claimed right of way through the disputed passage.

11. Both the courts below while considering the case of the plaintiff have committed an error in coming to the conclusion that though it is not mentioned in the rent note, exh.77, the one which is between the parties relying on the contents of exh.70, the rent note between a third party and the defendants, the plaintiff is having a right of way on the disputed passage, besides, the basic error committed in relying upon the document which is not between the parties. The courts below have also committed an error in interpreting the contents of exh.70-- rent note. The rent note produced at exh.70 is between defendant no.1 on one hand, in whose favour the same is executed by one Murajmal Savalmal, on the other who had taken the premises on rent. The averments relied upon by the courts below to come to such conclusion are:

"Tamo raheva vala ne"
(You, the person residing)

in para 3 of the rent note, exh.70. This phrase is to be interpreted with reference to the parties to a document, same cannot be interpreted to mean that it includes, 'the plaintiff'. The plaintiff cannot get some right by virtue of this phrase in that document. Further the courts below ought not to have read the aforesaid phrase in isolation. Any document when produced and relied upon, it is obligatory on the part of the courts to read that document as a whole to interpret any phrase, used in that document. The document is in Gujarati and while reading the document as a whole it is apparent on the face of the document that the same is dealing with the

rights of the parties to that document alone. It is a document between two specific parties and therefore, it governs the rights of those parties alone. The courts could not have interpreted the document to mean that the plaintiff is getting the rights under that document. In this view of the matter, finding recorded by both the courts that the plaintiff had right of way through the passage is not borne out from the contents of the document.

12. So far as the alternative way is concerned, the learned advocate Mr.Desai relied upon the judgement of the Honourable the Apex Court in the matter of Messrs Orient Distributors v. Bank of India Ltd. and others, reported in AIR 1979 SC 867. Mr.Desai, the learned advocate pointed out that the facts of the case before the Apex Court were almost identical to the facts of the case on hand. There the tenants had an alternative way which they could have used in the event of closure of regular way available to them. When the way used by them was closed, litigation started. One of the grounds on which the action of closing the passage was challenged was that the alternative way is not convenient or advantageous. The Honourable the Apex Court, in para 5, observed as under:

> ".. .. In such a case it is obvious that if there be no other access whatsoever to the portion of the building detained by the second respondent, the second respondent would be entitled to an access to the retained portion through the disputed passage as an easement of necessity but on admitted facts the second respondent had provided to their tenants alternative access to their respective tenements through Vanniar Street. In view of this, the High Court rightly concluded that there was no question of the appellants having the use of the disputed passage as easement of necessity. The aspect that the alternative access is not as convenient or advantageous as the entrance from the Errabalu Chetty Street would be irrelevant."
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> (emphasis supplied)

12.1 Mr.Desai, the learned advocate appearing for the appellant submitted that the facts of the case on hand are stronger than the one which were before the Honourable the Supreme Court. He submitted that in the case before the Honourable the Supreme Court there was no document, right was claimed on the basis of the oral words, while in the present case there is a rent note

between the parties and as observed by the courts below, the rent note is silent on the point of 'right of way' of the plaintiff through the disputed passage, still the courts below relying upon the document between the defendant and the third party has held that the plaintiff is having right of way through the disputed passage. He strenuously submitted that once there is a document between the parties to the proceedings, it is only that document which can be looked into, no other material could have been taken into consideration by the courts below to come to the conclusion that the plaintiff is having a right of way.

13. The learned advocate also placed reliance on the judgement of the Honourable the Apex Court in the matter of Lekh Raj v. Muni Lal and others, reported in A.I.R. 2001 SC 996, to contend that the subsequent event or fact can be taken note of, more particularly when such an event or fact is having a bearing on the issues or reliefs in a suit or proceeding. The Honourable the Apex Court has observed as under:

> ".. .. the Court should not shut its door. All laws and procedures including functioning of Courts are all in aid to confer justice to all who knocks its door. Court should interpret the law not in derogation of justice but in its aid. Thus, bringing on record subsequent event, which is relevant, should be permitted to be brought on record to render justice to a party."

14. The mandate of law is very succinct which must be followed by this Court in letter and spirit. In the present case, the appellant has filed Civil Application No.8760 of 2001 on 9.4.2001. But the same could not be placed for orders in absence of the papers of the Second Appeal. By the said Civil Application, the applicant-appellant herein has placed on record that the road on eastern side of the block about which it was observed by both the courts as under:

> ".. .. In the east there is Municipal road. There are gutters and ditches and therefore, it is not useful as a road."

It is now a well surfaced tar road, it can be seen from the photographs, totalling to six, taken from different angles, the details of these photographs are set out in para 5 of the application. The road is in good condition and observations of the learned first appellate Judge

will not survive any more.

14.1 Mr.Desai, the learned advocate pointed out that the respondents are not served with this Civil Application and therefore, Court may not refer to this Civil Application or the subsequent events so that it may not be argued against the appellant that he produced something before the Court at the back of the respondents in Second Appeal.

14.2 The Court is conscious of the fact that in Civil Application no notice is issued, still the Court has looked into the facts narrated in the Civil Application because the facts are of the nature of which a judicial notice can be taken and besides, this is not the only decisive factor on which Second Appeal is decided. This is only in addition to the facts discussed hereinabove, just to satisfy the conscience of the Court that when the Court is driving the plaintiff to that alternative way, it is a useful road.

15. In view of the aforesaid discussion, the Second Appeal is allowed. The judgement and decree of the courts below are quashed and set aside. The suit is hereby dismissed.

16. No orders on Civil Application No.8760 of 2001. The same is disposed of accordingly.

(Ravi R. Tripathi, J.)

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